

Employment Inquiries

The Fair Employment and Housing Act prohibits any non-job related inquiries of employees or applicants, either verbally or through the use of an application form, that expresses, directly or indirectly, a limitation, specification or discrimination as to physical disability, mental disability and medical condition.

Applicants

The FEHA prohibits an employer from:

- ◇ requiring any medical/psychological examination/inquiry of any applicant;
- ◇ to make any inquiry whether an applicant has a mental/physical disability or medical condition; or
- ◇ to make an inquiry regarding the nature and severity of a mental/physical disability or medical condition.

However, an employer may inquire into the ability of an applicant to perform job related functions and may respond to an applicant's request for reasonable accommodation.

Once an employment offer has been made to an applicant, but before the start of duties, an employer may require a medical/psychological examination providing that the examination/inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

Employees

An employer may not:

- ◇ require any medical/psychological examination or inquiry of an employee, or
- ◇ inquire whether an employee has a mental/psychological disability or medical condition; or
- ◇ inquire into the severity of the disability or condition.

However, an employer may require examinations or make inquiries that it can show are job-related and consistent with business necessity. An employer may conduct voluntary medical examinations, including medical histories, which are part of an employee health program available to employees at the worksite.

Discrimination

An employer who discriminates against a person because of his/her disability may do so **only** if the employer can demonstrate that:

1. The person is unable to perform the essential functions of the job and that **no** reasonable accommodation exists that would enable the person to perform the essential functions of the job; or
2. The person would create an imminent and substantial danger to himself/herself or a substantial danger to others by performing the job and that **no** reasonable accommodation exists that would remove or reduce the danger.

The following two reasons commonly raised by employers **are not** legally acceptable excuses for discriminating against disabled persons:

1. That there is the possibility of future harm to the person or to others.
2. That employing such individuals will cause an employer's insurance rates to rise.

Reasonable Accommodation

The employer is required under law to participate in a good faith interactive process to explore all possible means of reasonably accommodating a person prior to rejecting the person for a job or making any employment-related decision.

An accommodation is reasonable if it does not impose an undue hardship on the employer's business. Reasonable accommodation can include, but is not limited to, changing the job duties, changing the work shift, providing leaves for medical care, accommodating schedules, relocating the work area, and providing mechanical or electrical aids. An employer may obtain help from government agencies and outside experts to determine whether accommodation is possible.

Disabled employees may have separate rights to unpaid leaves under the *California Family Rights Act (CFRA)* or the federal *Family Medical Leave Act (FMLA)*.

Independent Medical Opinion

An employer must allow an applicant the opportunity to submit an independent medical opinion if there is a dispute as to whether the person can perform the essential functions of a position. Failure to allow the submission of an independent medical opinion may be a separate violation of the law.

AIDS

California law recognizes AIDS as a disability, which may require an employer to provide reasonable accommodation to enable the employee to continue working as long as he/she is medically able. Employees who are perceived as having AIDS or who have been medically tested as HIV positive are also protected.

Employers should engage in activities that inform employees about AIDS and HIV by:

1. Ensuring that company policy states that an employee with AIDS or a HIV positive diagnosis will be treated as any other employee with a life-threatening ailment. The policy should also state that such employees may continue to work as long as they can perform their duties and medical evidence supports the same.
2. Developing an internal educational program that allays fear by communicating authoritative information on AIDS transmission; i.e., there is no known risk of AIDS transmission between an infected employee and other employees while engaged in their normal activities which may involve close contact at work.

Technical assistance is available from several sources:

AIDS Project, Los Angeles (323) 993-1600 provides employers and others with an "AIDS in the Workplace" program including printed material.

California HIV/AIDS Hotline
(800) 367-2437 (English or Spanish)
TTY (800) 553-2437 provides written materials, brochures, and information.

How the Law is Enforced

Employees or job applicants who believe that they have been discriminated against or harassed because of a disability may, within one year of the alleged discrimination, file a complaint of discrimination with the California Department of Fair Employment and Housing. The Department processes complaints filed by persons with terminal illnesses on a priority basis.

The Department serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If the Department finds evidence of discrimination and settlement efforts fail, the Department may file a formal accusation. The accusation will lead to either a public hearing before the Fair Employment and Housing Commission or a lawsuit filed by the Department on behalf of the complaining party.

If the Commission finds that discrimination occurred, it can order remedies, not to exceed \$150,000 in fines or damages for emotional distress from each employer or person charged. In addition, the Commission may order hiring or reinstatement, back pay, promotion, and changes in the policies or practices of the involved employer.

After a complaint is filed with the Department, a complainant may elect to pursue the matter through a lawsuit in civil court. Damages in court are unlimited.



State of California
Department of Fair Employment & Housing
2014 T Street, Suite 210
Sacramento, CA 95814

Employment Discrimination Based On Disability

The *Fair Employment and Housing Act (FEHA)* enforced by the California Department of Fair Employment and Housing prohibits employment discrimination and harassment based on a person's disability or perceived disability. It also requires employers to reasonably accommodate an individual with a mental or physical disability unless the employer can show that to do so would cause an undue hardship.

The law covers mental or physical disabilities (including AIDS/HIV) regardless of whether the conditions are presently disabling. It also covers medical condition, which is defined as either cancer or genetic characteristics.

Disability does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance abuse disorders resulting from the current illegal use of drugs.

The Americans with Disabilities Act vs. The Fair Employment and Housing Act

The Legislature, as of January 1, 2001, in its findings and declarations, states that the "law of this state in the area of disabilities provides protections independent from those in the federal *Americans with Disabilities Act (ADA) of 1990*." It further states that the FEHA has broad definitions of mental disability, physical disability and medical condition so that applicants and employees are protected from discrimination for actual or perceived disabilities, potential disabilities, or disabilities that are perceived to be potentially disabling.

Under the laws of this state, a disability must only "limit" a major life activity but the disability does not have to represent a "substantial limitation" as under federal law, to be considered a disability. Further, the determination as to whether a condition or disability limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity.

**For more information,
contact the Department
toll free at:
(800) 884-1684**

**Sacramento area & out-of-state
(916) 227-0551**

**TTY Number
(800) 700-2320**

**or visit our website at:
www.dfeh.ca.gov**